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NO. 86-997

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RUTH THOMAS, Petitioner

vs.

JOE D. RHODES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF IN OPPOSITION

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February 5, 1987

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BRIEF IN OPPOSITION

Joe D. Rhodes, Respondent, by and through his attorney of record, files this Brief in Opposition to the Petition for Writ of Certiorari (hereinafter petition) filed herein by Ruth Thomas, Petitioner. The petition was received by the Respondent on December 10, 1986.

Permission for extension of filing Brief in Opposition was granted by the Court on January 5, 1987, extending the time for filing Brief in Opposition to February 9, 1987.

OPINION BELOW

Petitioner's recitations respecting the opinion of the Court of Appeals for the Second Supreme Judicial District of Texas, and the denial of Petitioner's subsequent application for Writ of Error and Motion for Rehearing are correct. See Rule 34.2 of the Rules of this Court. The opinion of the Court of Appeals is set forth in the Appendix of the petition and is not duplicated in this brief.

JURISDICTION

The Petitioner's factual recitations regarding jurisdiction are

correct.

STATEMENT OF THE CASE

The case began as a suit to Trepass to Try Title, wherein Petitioner sued Respondent, seeking recovery of one-half of a partial of real property purchased by the Respondent at a tax sale. Petitioner also sought partition, accounting, and one-half of all rents and profits earned by Respondent during his possession.

The case arose as a result of seizure and sale of property held in the name of Roy Thomas, Petitioner's husband for unpaid Withholding and F.I.C.A. taxes. Beginning in 1969, Roy G. Thomas, husband of Ruth Thomas Petitioner herein, had fallen behind in payments of his Withholding and Social Security taxes to the Internal Revenue Service. The failure to pay continued through 1970. As a result of such failure, on July 11, 1972, the Internal Revenue Service served

Mr. Thomas with a notice of seizure and sale, advising him that the property located at 5700 James Avenue, Fort Worth, Texas 76115 (hereinafter the James Avenue property) which was the subject matter of this suit, would be sold at public auction on September 1, 1972. Respondent was high bidder at the sale and took immediate possession of the property. Respondent immediately began to take such actions as are common to ownership; he paid off the existing note on the property, paid all property taxes due thereon, held the property out for rent, collected the rent, and made improvements and repairs to the property. Petitioner made no claim to the property until March 5, 1982, when her attorney sent Respondent a letter claiming that Petitioner owned an undivided one-half interest in the property. On May 7, 1982, Plaintiff filed the lawsuit which ultimately

resulted in this appeal. In this suit, Plaintiff contended that the sale had been that of an undivided one-half interest in the property, alleging the property to have been the community property of herself and her husband Roy Thomas. Respondent answered, contending that the entire property passed to him via the sale; that the Petitioner was estopped from pursuing the action by failure to follow the statutory redemption procedure pursuant to 26 Sec. 6337, and that the five year Statute of Limitations (Art. 5509, Vernon's Annotated Civil Statutes, now Sec. 16.025, Texas Civil Practices and Remedies Code) barred recovery by Petitioner. Petitioner rests her case in this Court on these issues.

The suit was tried to the Court which found in favor of Respondent, entering a take nothing judgment for Petitioner.

Petitioner then appealed to the Court of Appeals, citing 43 separate points of error. The Court of Appeals, in an unanimous opinion, affirmed the trial court on all points. (Thomas v. Rhodes, 701 S.W.2nd 943, Tex. App., 2nd Dist., 1986.) Petitioner then filed her application for Writ of Error to the Texas Supreme Court, which error was refused by the State Supreme Court on June 11, 1986, citing no reversable error. Petitioner next filed a motion for rehearing of her application for Writ of Error which was overruled by the Texas Supreme Court on September 10, 1986.

REASONS FOR NOT GRANTING THE WRIT:

I.

The Court of Appeals correctly concluded that the seizure and sale of the James Street property by the Internal Revenue Service divested Petitioner of

all right, title and interest she had or may have had in that property.

Petitioner's first point in her petition for Writ of Certiorari is based on an apparent dichotomy between ownership of the James Street property, and liability for the taxes in question. Petitioner urges, and Respondent does not dispute, that the James Street property was the community property of Petitioner and her husband Roy G. Thomas. Petitioner then, without apology, makes a 180 degree turn and asserts that the taxes in question, which arose from the operation of a business on community property, the proceeds from which were utilized for community support in the payment of community obligations, were the sole and separate liability of Petitioner's husband Roy G. Thomas. Petitioner apparently basis this reliance upon the fact that only the name of Roy G.

Thomas appeared upon the Form 941's which were filed with the Internal Revenue Service. This, in spite of the fact that the tax liabilities were for unpaid Withholding and F.I.C.A. trust fund taxes, arising from the operation of a community owned sole proprietorship. Income from the cleaners was placed in a joint checking account, used to pay the joint living expenses of the parties. The Petitioner was empowered to write checks on the account of Zip Cleaners and was aware that taxes in question had not been paid. To allow Petitioner's reliance on the name appearing on the tax return as controlling on this issue, would be a prime example of the elevation of form over substance. Similarly, Petitioner's reliance upon United States v. Rogers, 461 U.S. 677 (1983) United States v. Molina, 584 F. Supp. 1011 (S. D. Tex., 1984), and Hollingshead v. United

States, 85-2 U.S.T.C. Para. 9772 (N. D. Tex., 1985) are misplaced. Both the trial court, and the Court of Appeals, found sufficient authority to regard the unpaid taxes as the community obligation of Petitioner and Roy G. Thomas. In fact, on oral argument before the Court of Appeals, counsel for the Petitioner assured the Court that the taxes in question were a community debt. Thomas V. Rhodes supra at page 945.

In short, Petitioner seeks to have the best of both worlds; to have the James Street property declared to be community property, but to have the tax obligations incurred by the business operated on such property to be held the sole obligation of her husband.

II.

The Court of Appeals correctly decided that Petitioner waived her right of recovery of the subject property by her

failure to follow the statutory redemption procedures of Title 26, Sec. 6337, United States Code.

In her argument upon this point, Petitioner correctly paraphrases 26, Sec. 6337. However, the emphasis on the use of the word "permitted" by Plaintiff is misplaced. Obviously, one whose property is foreclosed upon and sold for delinquent taxes need not redeem the property. However, Sec. 6337 does carry a "penalty" for failure to redeem. The provisions of 26 U. S. Code Secs. 6338 and 6339 clearly set forth that failure to redeem does have its consequences:

> "(b) DEED TO REAL PROPERTY. - In the case ofreal property sold as provided in Section 6335 and not redeemed in the time and manner provided in Section 6337, the Secretary shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts

set forth in the certificate."

---26 U.S.C. Sec. 6338.

* * *

"(b) DEED OF REAL PROPERTY - In the case of the sale of real property pursuant to Section 6335---

"(1) DEED AS EVIDENCE - The deed of sale given pursuant to Section 6338 shall be prima facie evidence of the facts therein stated; and

"(2) DEED AS CONVEYANCE OF TITLE - If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto."

---26 U.S.C. Sec. 6339

The importance of the redemption provisions and the period therefor is such that a delay of only one day has been held to be fatal. Howard v. Adele, 82-1 USTC, Para. 9176 (E.D. Mich. 1982)

Furthermore, Texas Courts have recognized the redemption procedure under

Sec. 6337 as the sole method to recover property sold under 26 U.S.C. Sec. 6335. Bateman v. Rice, 653 S.W.2d 951 (Tex. Civ. App. - Amarillo 1983, writ. ref'd., n.r.e.)

If, as held by the Court of Appeals, Petitioner's interest in the subject property was divested by the federal tax sale on September 1, 1972, her failure to redeem under Section 6337 precludes her from recovery on this point. If not, the court's ruling on estoppel is harmless error.

III.

The Court of Appeals correctly found that any cause of action Petitioner might have had for title to the subject property is barred by Art. 5509, Vernon's Annotated Civil Statutes.

Even if the Court should find ground for granting the Writ in Petitioner's first two arguments, an

independent state ground exists which includes such granting. It is this ground which Petitioner labels "unfounded". Petitioner's total argument as to the inapplicability of this ground seems to be that Respondent did not prove beyond the shadow of a doubt that the property taxes on the subject property were paid prior to delinquency. The trial court found that the Respondent had timely paid all taxes on the property, which issue was affirmed by the Court of Appeals. This affirmation was impliedly approved by the State Supreme Court when it refused to grant Writ of Error on this or any other issue. Accordingly, the Statute of Limitations question must stand as handed by the lower court in Respondent's favor. Statute of Limitations are a State issue, and thus present neither a federal nor a constitutional question for this Court to

review. McLaughlin v. Fowler, 154 U.S. 663 (1880).

CONCLUSION

Conclusion for the reasons stated herein the petition filed in this case should be denied.

Respectfully submitted,

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Dated: February 5, 1987

PROOF OF SERVICE--CERTIFICATE BY BAR MEMBER

I, JOE K. GORDON, counsel of record, and the attorney for Joe D. Rhodes, Respondent herein, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of February, 1987, I served three copies of the foregoing Petition for Writ of Certiorari, Brief in Opposition on Petitioner by depositing same in a United States Post Office, with first class postage prepaid, addressed to

Petitioner's Counsels of record at their addresses, as follows, to-wit:

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I further certified that all parties required to be served have been served.

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